BUREAU OF LAND MANAGEMENT
v.
WAGON WHEEL RANCH, INC.

IBLA 80-957 Decided February 25, 1982

Appeal from decision of Administrative Law Judge Robert W. Mesch, directing reconsideration of apportionment of grazing privileges and leases issued pursuant to range line agreement. CO 010-79-2(15).

Reversed.

1. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Apportionment of Federal Range

   Where grazing licensees have executed a valid range line agreement approved by this Department, such an agreement has generally been treated by the Department as an enforceable contract. Therefore, those items specifically spelled out in the agreement which are unmistakably clear are binding upon the parties unless changed by their mutual consent with the approval of the Bureau of Land Management.

2. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Grazing and Grazing Lands -- Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Appeals -- Rules of Practice: Appeals: Burden of Proof

   A decision reached in the exercise of administrative discretion relating to the adjudication of grazing privileges may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, or where it is shown that it does not represent substantial compliance with the grazing regulations.

> The burden is upon the appellant to show by substantial evidence that a decision is improper or unreasonable.

APPEARANCES: Marla E. Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for appellant; Scott R. Santerre, Esq., Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Bureau of Land Management (BLM) appeals from a decision dated August 20, 1980, by Administrative Law Judge Robert W. Mesch, which directed the District Manager, Craig District Office, to reconsider an apportionment of grazing privileges between Wagon Wheel Ranch (appellee) 1/ and Clarence W. Osborn.

The apportionment was the result of a range line agreement (RLA) entered into between appellee and Clarence W. Osborn and approved by the BLM Area Manager on February 16, 1978. Several months later, appellee became dissatisfied with the agreement and on or about June 19, 1979, a meeting was held on the matter before the District Manager, Marvin W. Pearson. The file contains no record of this meeting; however, on July 20, 1979, the District Manager wrote appellee as follows:

> Gentlemen:
>
> We have not heard further from you since our June 19th meeting and your meeting with Mr. Clarence Osborn. We assume no mutual agreement was obtained.
>
> In the absence of a new agreement, the previous agreement must stand since it was accepted, reviewed and approved in good faith by this office and new leases were applied for and issued based on its content. Our original review of existing agreement (copy attached) found the line acceptable from the standpoint of proper use of the public land due to water, terrain, private land needs, livestock distribution, and fence construction and maintenance. In our review, we find nothing that substantially contradicts our previous findings.
>
> Any modification of the existing range line agreement, dated February 24, 1978, must be based on a proposed change that is mutually acceptable to the parties who originally agreed to the range line boundary. The Bureau of Land

1/ Although Wagon Wheel styles itself as appellant, we use the term "appellee" throughout this opinion because in the proceeding before the Board, Wagon Wheel is the responding party.

> Management would certainly be amenable to review any such proposed changes that can be agreed upon by all parties involved.

By letter dated August 1, 1979, appellee advised the District Manager that "Mr. Clarence Osborn did not feel inclined to amend the range line agreement" and that appellee felt the District Manager's position was in error. On August 20, the District Manager issued the letter decision giving rise to this appeal. That letter decision stated in pertinent part as follows:

> Our letter of July 20th was not a proposed or final decision; it was a statement of fact that your lease was issued based on a range line agreement presented to the Bureau and executed first by the lessees and Wagon Wheel Ranch, then approved by this office after review for compliance to reasonable criteria from a range management standpoint.
>
> It was our opinion then and still is at this time that the agreement was presented to us in good faith and with full understanding of its contents by the signing parties.
>
> If, in your opinion, you feel your client has been adversely affected by the Bureau approving the subject range line agreement and issuing grazing leases pursuant thereto, you have the option of filing an official appeal for a hearing before an Administrative Law Judge. Any such appeal would be filed pursuant to 43 C.F.R., part 4160.4.

A hearing was held before Judge Mesch on April 30, 1980, in Craig, Colorado. Following is a summary of the pertinent evidence adduced at the hearing.

Clarence W. Osborn and his brother, Kermit I. Osborn, operated adjoining ranches in Moffat County, Colorado. Until 1977, the two brothers held, in their joint names, a section 15 grazing lease covering allotment No. 4127. On September 2, 1977, Kermit I. Osborn deeded his ranch to appellee. His interest in the grazing lease was conveyed in the deed as "all of grantor's interest in and to a permit issued by the BLM for 125 AUM's in allotment #4127" (Tr. 10, Govt Exh. 2).

To obtain a frame of reference for the controversy before us, it is necessary to inspect appellant's exhibit 1, which is a Geological Survey map. On the map Wagon Wheel Ranch is shaded orange, Clarence W. Osborn's ranch is shaded pink, and the abutting BLM lands are shaded yellow. A double red line across the BLM lands depicts the range line agreement of February 24, 1970. A blue line, to the east of the double red line is labelled "Range line proposed by Wagon Wheel Ranch." The area between the red and blue lines was referred to as the "disputed area" throughout the hearing (Tr. 83). Both lines were only partially

fenced. Along the red line there were some old fence posts and old wire. There was a drift fence along a portion of the blue line (Tr. 22, 23, 33, 45, 56).

In October of 1977, Clarence W. Osborn contacted Carroll Levitt, BLM Area Manager, regarding a division of the BLM lands (Tr. 25). Levitt assigned the task of working out a range line agreement to his range specialist, Randy Massey 2/ (Tr. 27). According to the Area Manager, Massey, together with Clarence W., Kermit I. Osborn, and one of the Wagon Wheel owners, agreed to a specific range line agreement "on the ground." The agreement was reduced to writing by Massey and submitted to the Area Manager for review (Tr. 28). It provides as follows:

RANGE LINE AGREEMENT

> In accordance with the provisions of Grazing Regulations (43 CFR 4111.3-2(c)), we, the undersigned, hereby agree to the establishment or adjustment of our respective range allotment boundaries as shown on the attached map and further described as follows:
>
> T. 4 N., R. 91 W.
>
> The dividing line follows the ridge which begins in the SW corner of lot 4, Sec. 33, and goes north and east through lot 13, Sec. 28, through the NW corner of lot 14 same section, then cuts across the knob in lot 11, Sec. 28, and ties into the fence line on the hilltop. This ridge is a natural dividing line between the two places.
>
> It is further agreed that the above-described allotment boundary constitutes a fair, equitable, and practical range division, based on the respective qualifications of our dependent base property under the Grazing Regulations, and as such shall be binding upon our respective heirs, executors, administrators, successors in interest or assigns.

(Appellant's Exh. 2). Appended to exhibit 2 is a portion of a map on which a dashed line indicates the division line described in the agreement. The dashed line roughly corresponds to the double red line on appellant's exhibit 1. The RLA is signed by Kermit and Clarence Osborn and by Sid Pleasant as attorney for Wagon Wheel Ranch. It is also signed by Karl A. Smith, who negotiated the transfer of Kermit Osborn's

2/ Randy Massey did not testify.

ranch to Wagon Wheel (Tr. 109). As previously indicated, the Area Manager approved the RLA on February 24, 1978, having satisfied himself that it comported with good range management (Tr. 28). 3/

The Area Manager testified that the section 15 lease comprised 936 acres, and that pursuant to the RLA appellee obtained 31 percent (265 acres) and Clarence W. Osborn obtained 69 percent of the acreage. Under the RLA, the bulk of the available range would go to Clarence (Tr. 26-27). The Area Manager justified his endorsement of the RLA from the viewpoint of proper range management as follows:

> [By Mr. Weltsch]
>
> Q I assume you took into consideration the fact of the accessibility to water by the cattle to both ranches from the disputed area, is that correct?
>
> [By Mr. Levitt]
>
> A I sure did.
>
> Q The same would apply as far as access to the disputed area by cattle from those ranches?
>
> A Yes, I considered that, noting that the access could be to the area by livestock from either ranch. But, I did consider the fact that it's a rather steep, rough

3/ In the course of his testimony, the Area Manager mentioned that he followed the criteria of 43 CFR 4121.2-1(d) (1977), which provided:

"(d) Conflicting applications. (1) When more than one qualified applicant applies for the same public land and it appears that a division of the area may be made and will not result in improper land use, the Authorized Officer will allow the applicants an opportunity, within a specified time limit which he shall set, to agree to a division of the lands. A division of the lands may be made either by agreement between the conflicting applicants which is acceptable to the Authorized Officer, or by determination of the Authorized Officer where no acceptable agreement is reached. However, where it appears that a division of the land would result in improper land use, or where proper land use management will be advanced thereby, the Authorized Officer may require that joint use be made of the management area

"(2) The Authorized Officer will allocate the use of the public land on the basis of any or all of the following factors: (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands under application * * * (where access is not presently available), and (vii) other land use requirements." [Footnote omitted.]

> hill between the ranch of -- the Kermit Osborn Ranch and the Clarence Osborn Ranch. The range line agreement is a long high ridge, and I did not feel in the interest of utilization of that federal range that it could be proper for those livestock to come up over that ridge from Kermit Osborn's ranch into the basin and have to go back out of that basin to get to water adjacent to the Kermit Osborn property.

(Tr. 34; see also Tr. 39). The Area Manager amplified these considerations later on in his testimony:

> [By Mr. Levitt]
>
> A Well, in my opinion, and this is one of the things that I considered in approval of the range line agreement, is once those cattle come up over that hill, come downhill into the basin, they will have a tendency to stay in that basin as long as the feed is there. Granted, they will have to -- they can go back over that ridge to get to water, but they will have a tendency to stay in that basin long. Again, they will have a tendency to crowd the grazing fence because of the water being adjacent to that fence on the other side.
>
> They will also have a tendency to crowd that fence because of the existence of high meadows. That will attract those animals to stay in that area even once the feed is gone. Therefore, in my opinion, it would be detrimental to the public land in that basin for this kind of a situation to exist.
>
> [By Ms. Mansfield]
>
> Q Okay. So the access is not easy access back and forth and the terrain does not and water sources do not lend itself to easy back and forth movement for Wagon Wheel's cattle?
>
> A That's my opinion.
>
> Q There also seems to have been some question because you are estimating that there might be a seventy-thirty split of the forage, and Mr. Weltsch seems to think that fifty-fifty would be fair and equitable. But, you are supposed to examine the needs of the livestock operations of each ranch when you are making the division, is that correct?
>
> A That and the needs of that private land, yes.

Q If you look at the Wagon Wheel private lands, what is the approximate division between high meadows and native forage on their land?

A Well, there is roughly seven hundred and twenty acres of deeded land in the Wagon Wheel property, give or take. Because of easements, I would say that this is just an estimate that there would be maybe thirty percent of the private Wagon Wheel -- private property as in hay products, and the rest of it would be in native grass and browse production.

Q In other words, during the period of time where Wagon Wheel has to remove their cattle from their high meadows. They do have some area on their deed of land that they can move them into.

A That would be my opinion, yes.

Q Let's look at Clarence's ranch. What are the percentages there?

A Well, roughly four hundred acres give or take. Due to easements of that acreage, probably eighty or eighty-five percent of the property is in high production irrigated meadows.

Q So during the period of time where Clarence has to get his cattle off of his high meadows, he really is crunched for an area to keep his cattle?

A That's exactly right.

Q So for his operations, he might need a greater area in order to economically run a ranch than Wagon Wheel just due to the type of land that is in their private ranch?

A That's correct.

(Tr. 47-49). Asked to evaluate the quality of the entire section 15 lease the Area Manager testified:

Roughly, the west one-third of the lease area, in my professional opinion, probably produces the bulk of the feed available on that entire lease area. In comparison, the larger portion of the better forage area lies on the west end, and the bulk of that going to Wagon Wheel Ranch.

In comparison with what went to Clarence Osborn's side, the small amount in this basin is probably the best piece of grazing land in the entire lease area.

Q The sixty acres?

A Yes.

Q The rest of Clarence's land is pretty steep?

A Very marginal.

(Tr. 58).

With respect to historical use of the section 15 lands, Kermit Osborn testified that the blue line on the map represented the division he and his brother Clarence had been using for probably 30 years, and he saw no reason why it should be changed (Tr. 77, 81).

The testimony of Clarence W. Osborn also appeared to indicate that the blue line was the historical boundary between their operations (Tr. 88-89). He indicated, however, that the initial division of the Osborn ranch into the two ranches might have favored Kermit:

> A When we bought the ranch -- I'm going to tell you something now. * * * [Kermit] got over seven hundred acres, and I got under four hundred, and we looked at it, and I thought it was strange.

(Tr. 94). Clarence Osborn's dissatisfaction is further illustrated by the following colloquy:

> JUDGE MESCH: When you say that was supposed to be yours, anyway, that relates back to when Kermit got the seven hundred odd acres and you got the four hundred -- now, wait. Let me finish -- and you got the four hundred odd acres and it was your thinking at that time that since you got less of the private land you should have more of the federal allotment?
>
> THE WITNESS: Well, that's what looked fair to me, that I should have more.

(Tr. 99-100).

Kenneth Osborn, brother of Clarence and Kermit, and lessee of Wagon Wheel, testified that the blue line on the map was the historical division line between the operations of Clarence and Kermit. He opined that the BLM land allotted to appellee by the RLA would be practically useless (Tr. 124), and that the disputed area would be very important to appellee's operation (Tr. 128).

Sid Pleasant, signatory of the RLA for appellee testified that the Area Manager had told him the division in the RLA corresponded to historical use (Tr. 140-41). He testified that there had been no

representation as to exact percentages of land either party would obtain at the time the contract was consummated, and that he (Pleasant) had never seen the ground which was the subject of the boundary agreement (Tr. 142).

The Area Manager testified that before the RLA there had been an unofficial division of the BLM lands between Clarence and Kermit Osborn, but he did not know "how they were actually using the BLM land" (Tr. 23). He stated that he disregarded historical use in approving the RLA because it was recognized by BLM as a "joint tendency [tenancy] use" and he felt that historical use was irrelevant (Tr. 33). The Area Manager denied having told Sid Pleasant that the RLA corresponded to historical use. He testified: "I merely stated that it was my understanding that there was some type of an old agreement between [Clarence and Kermit] that was not recognized by us and that was the same line that I understood they had agreement to, although it was unofficial" (Tr. 40). He advised the District Manager that from a range management view point, BLM would be in "a better position" to defend the division line in the RLA (Tr. 41).

The District Manager testified that the RLA could be changed "if there is damage to one or incorrect range agreement or if there is an error made * * * even though both parties had signed it" (Tr. 116). He said that an example of an error necessary to justify a change would be an error "on the allocation of the permit, two people running in common, if there had been an error in adjusting what one individual was allotted versus the other one * * *" (Tr. 118).

Duke Duzik, a supervisory material resource specialist for BLM, testified that he ordinarily would have been consulted concerning a range line agreement, but was on another assignment when this agreement was entered into (Tr. 104-05). He stated that the RLA was a rational way to divide the lands (Tr. 108), but he felt that in absence of the RLA, there would be nothing wrong with the historical line (Tr. 106).

Having made his evaluation of the testimony, the Judge found and directed as follows:

> I find the testimony of the Area Manager less reliable, convincing and understandable than the testimony of the other witnesses. I conclude that (1) representatives of the appellant signed the range line agreement under the mistaken belief that (a) the agreement divided the allotment along the same line as that adopted and used by the two Osborns; and (b) the appellant was obtaining the interest held by Kermit Osborn in the allotment and the use of the land that had historically formed an integral part of the Kermit Osborn ranch; (2) there was, and is, no justifiable reason to change the division line that was adopted and used for some 30 years in the operation of the two ranches; (3) the only conceivable reason for changing the division line was to unjustly benefit Clarence Osborn at

> the expense of the appellant, a stranger in the area; (4) the historic division line proved to be acceptable, and, in fact, is acceptable from the standpoint of proper range management practices; and (5) the division line adopted by the District Office, if permitted to stand, will have adverse, and unnecessary, economic consequences insofar as the appellant's ranching operation is concerned.
>
> The District Manager is directed to reconsider the apportionment of grazing privileges between the appellant and Clarence Osborn, and, if the appellant is otherwise qualified, to issue a lease to the appellant for the 475 acres historically used in conjunction with its ranch.
>
> If the District Manager assigns only 7 to 10 AUM's to the disputed area, in line with the testimony of the Area Manager attempting to depreciate the value of the disputed area, then he should be prepared to justify that determination in view of (1) the apparent fact that the present leases have been issued on the basis of a carrying capacity of 7.5 acres per AUM; and (2) the testimony of the Area Manager that the west one-third of the lease area probably produces the bulk of the feed available on the entire lease area and the disputed area might be the best piece of land in the entire lease area.

(Decision at 5-6).

In its statement of reasons BLM first argues that the Judge failed to employ the proper standard of review. BLM points out that appellee agreed (Tr. 17, 108) that the RLA was in conformance with proper range management. Thus, BLM argues, no basis exists for reversing the District Manager's August 20, 1979, decision, which held that the RLA comported with proper range management. BLM urges that a District Manager's decision may be reversed only where it is arbitrary, capricious, or not supportable on any rational basis.

BLM tabulates 11 findings of fact which it argues were ignored or improperly evaluated by the Judge. BLM suggests further that the Judge was confused as to the basic value of the disputed parcel and as to who could best use this parcel as an integral part of the ranching operations.

BLM requests the Board to affirm the District Manager's decision of August 20, 1979. In the alternative BLM asks that the Judge's decision "be modified so as to declare the range line agreement void and the District Manager directed to issue leases on the basis of his discretion to apportion the range by regulatory criteria" (S/R at 6).

Appellee contends that it entered the RLA on the basis of misrepresentation and misinformation. Specifically, appellee argues it believed that the division line being agreed to corresponded to the historical (blue) line. Appellee states it would not have entered the RLA had it "known the true facts, i.e., that the line established in the range line agreement did not coincide with the historical use, was not the ridge upon which the drift fence is located; and that [appellee] was losing the use of approximately 210 acres of BLM land as a result of the 'new boundary'."

Appellee further contends that the action of the Area Manager in approving the RLA and issuing the leases was arbitrary and capricious. Appellee asks that the Board affirm the Judge's decision. 4/

We begin our discussion with a consideration of the law and precedent applicable to range line agreements. The characteristics and effects of range line agreements were set forth as follows in Evart Jensen, 5 IBLA 96, 99 (1972):

> Generally, valid range line or allotment boundary agreements have been treated by the Department as enforceable contracts. They are entered into by two or more parties and the mutual promises of the parties to abide by the terms of the agreements and thus waive their rights to ask for a change in the line or boundary thus established constitutes ample consideration to support a contract. Mrs. Dulcie S. Williams, I.G.D. 280 (1942).

Jensen involved an RLA containing a legal description of the boundary and an attached map on which the boundary was drawn in. Both documents referred to each other. Reading them in pari materia, the Board further stated:

> As to all those items clearly spelled out in the agreement and to the north-south division line represented by a complete legal description and a heavy, black line drawn across the attached map there can be no question as to their meaning. These items are unmistakably clear and are binding upon the parties unless changed by their mutual consent with the Bureau's approval.

4/ In addition appellee has raised a question as to the timeliness of BLM's appeal. BLM received the Judge's decision on Aug. 22, 1980. BLM's notice of appeal was transmitted to Judge Mesch on Sept. 22, 1980. Appellee contends that the 30-day period allotted by 43 CFR 4.411 ended on Sept. 21, 1980. However, Sept. 21, 1980, fell on a Sunday. Therefore, an appeal transmitted on Monday, Sept. 22, 1980, must be considered timely. See 43 CFR 4.401 and 4.22(e); Ilean Landis, 49 IBLA 59 (1980).

Id. at 99. In Boyd L. Marsing, 18 IBLA 197, 201 (1974), the Board further elucidated the policy and ramifications of range line agreements, stating that the

> "contract" theory was supported by the fact that such agreements were entered by two or more parties and their mutual promises to abide by the division (which established private allotments) initiated the mutual rights and duties necessary to enforcement of the contract. However, this analysis was qualified by two exceptions: if the agreement was consummated under conditions warranting rescission; or if "it is incompatible with the proper administration of the Federal range."

In Marsing, the Board quoted from Wayne M. Whitehill, I.G.D. 486, 489, 490 (1947):

> Under range conditions as they actually exist on the public lands, range-line agreements have long been a natural and regular basis for division of the range between livestock operators. These range divisions do not create any vested rights to the continued use of the Federal range in accordance with such private agreements, no matter how long such a division has previously existed; and despite any such agreements on previous use, the Bureau of Land Management may, if deemed necessary in the public interest, close any area to grazing or modify the allotments of a permittee or licensee, or disregard these agreements if they usurp the Bureau's function of adjudicating the rights of allottees as to numbers of livestock to be permitted, time of grazing, and other related matters.
>
> * * * * * * *
>
> * * * Unless the public interest or the needs of governmental administration require modification of the boundary line or withdrawal of some or all of the lands from a particular permittee or licensee, these range-line agreements are generally recognized by this Department as effective between the parties, unless it is clearly shown that force or coercion was used in effecting the range-line agreement, or that rescission of the contract is warranted, or that radical changes have occurred which merit a reconsideration of the range-line, or the parties themselves agree on a modification.

Also pertinent to the appeal before us are the criteria governing an adjudication of grazing privileges by a District Manager. Such an adjudication, reached in the exercise of administrative discretion, may be regarded as arbitrary, capricious, or inequitable only where it is

not supportable on any rational basis, or where it does not substantially comply with grazing regulations. The burden is on the objecting party to show that such a decision is improper or unreasonable. Bert N. Smith v. Bureau of Land Management, 48 IBLA 385 (1980).

[1, 2] In light of these authorities, we proceed now to the conclusions reached by the Judge. The first of these is that appellee's representatives entered the RLA under mistake of fact as to where the boundary was. In our view, part of the oral testimony is equivocal on this point, since Sid Pleasant's statements were controverted by those of the Area Manager. On the other hand, the Area Manager's testimony that Massey, Kermit, and Clarence Osborn, as well as one of the Wagon Wheel owners, agreed to a specific boundary on the ground (Tr. 28), is not disputed. This specific agreement is reflected by the RLA which contains a legal description of the boundary line and a depiction of this line in the attached map. The map is referred to in the text of the RLA wherein the signatories agree that "the above described boundary constitutes a fair, equitable and practical range division." In our view, the record demonstrates no duress, coercion, or other conditions which would compel rescission or reconsideration of the RLA.

The Judge's next several conclusions emphasize the factor of historical use between Kermit and Clarence Osborn. We note that under the regulation in effect at the relevant time (n.3, supra), the consideration of historical use as a decisional factor is discretionary, not mandatory. The regulation allows the authorized officer to allocate use of the public land based on "any or all" of seven listed factors, including historical use. Therefore, it was not necessary to consider historical use. As the excerpts from the testimony show, the Area Manager concisely and repeatedly explained, within a framework of proper range management, why the RLA constituted a good division. His testimony was not significantly challenged by other witnesses. Appellees, themselves, agreed that the RLA comported with proper range management. We conclude that the record supports the RLA and does not in any way indicate that Clarence Osborn was benefited unjustly at appellee's expense (see especially Tr. 58, supra).

We are further unable to agree that the RLA will have adverse economic impacts on appellee's ranching operations. The general, self-serving statements to this effect by Kenneth Osborn are more than outweighed by the Area Manager's analysis of the two ranching operations in terms of topography, water, and availability and quality of forage.

Appellee has not demonstrated that the District Manager's decision sustaining the RLA was arbitrary, capricious, or inequitable. On the basis of this record we see no reason why he should reconsider the RLA or the leases issued in conjunction with it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed and the decision of the District Manager is affirmed.

_____
Anne Poindexter Lewis
Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While in complete accord with the rationale and the result reached in the main opinion, I wish to contribute my own analysis of the case in support of that opinion.

First, emphasis needs to be laid on the fact that Kermit and Clarence Osborn had held this lease jointly, and that no division line had ever been approved or recognized by BLM. The fact that they had reached some unarticulated, informal, understanding as to how they would utilize the premises for their respective purposes did not operate to invest either of them with any right to exclusively control, let alone to convey, any specific portion of the leasehold. The fact that Kermit had utilized a larger portion of their jointly-held leasehold for many years without stringent objection by his brother 1/ could never serve to control any subsequent partition of the leased lands between his brother and a third party. An applicant for grazing privileges is not entitled to graze on a particular area of public land solely because he and his predecessors have grazed the area over a long period of time. M.P. Depaoli & Sons, I.G.D. 553 (1951). By analogy, if Clarence and Kermit had jointly leased a house, and over the years of their residence some of the rooms had become known as "Clarence's" and some as "Kermit's," one who purchased Kermit's interest in the lease could not reasonably expect to gain exclusive possession of the same rooms without a definite contract to that effect which would bind all the parties.

The second point I wish to emphasize is that the parties subsequently did enter into a binding and definite contract dividing the leased land. While Judge Mesch found that appellant's representatives mistakenly believed that they were accepting a division along the same line historically utilized by Clarence and Kermit, this unilateral mistake is not a basis on which their agreement can be voided and an award of additional land can be justified. Appellant's representatives knew exactly what land they were agreeing to accept when they signed the range line agreement. They had been to the property and had it pointed out where the line would run, they had seen it depicted on a map, and it was described in writing on the range line agreement itself, which they signed. Karl Smith, who negotiated the acquisition of Kermit Osborn's ranch, and who signed the range line agreement as Secretary-Treasurer of Wagon Wheel Ranch, Inc., had been in the motel business,

1/ Clarence Osborn's testimony indicated that his agreement to the division of the joint use with his brother was more a matter of reluctant acquiescence than something he enthusiastically desired. He stated that he thought it was "strange" that Kermit had got so much more than he; that they had discussed changing the line to the location where it is presently, and Kermit had agreed to the relocation provided Clarence would pay for a fence; that it wasn't done because they were busy; that he didn't consider the arrangement with his brother fair (Tr. 94-96, 99).

the farming business, and the real estate business. He testified that he and others, together with Kermit, "walked out along the road, he (Kermit) would point up along the line and try to tell us where the BLM division line was" (Tr. 110). The line described on that occasion was the line that the parties formally agreed to. Wagon Wheel Ranch, Inc., was represented by an attorney who had practiced in the region since 1933. He had examined the contract of sale, the deed, and the range division line agreement, which he also signed on behalf of Wagon Wheel Ranch as attorney for the corporation. He testified that he tried to get Kermit Osborn to tell him what the extent of Kermit's interest in the grazing lease was, but "he [Kermit] wouldn't set any definite percentage as to with relation to [sic] one hundred percent interest, nor would he do as to numbers [of animal unit months], because he said he just didn't know. But, he was sure his brother's interest was larger in it than his" (Tr. 139). The attorney also testified that he inquired at the BLM office and ascertained that the interest in question was a "section 15" grazing lease held jointly by Kermit and Clarence Osborn. He understood that Kermit had contracted to convey his "interest" in that lease.

The implication by the corporation is that Kermit had promised to convey an interest in the lease which would encompass all the land up to the "gentleman's agreement" line which he had historically used, but that he then misrepresented where that line was. However, when Kermit Osborn appeared as a witness at the hearing, no questions were directed to him by counsel for the corporation which would establish such a misrepresentation. But whether or not he misrepresented the extent of his use or the location of the informal division line, or whether or not Clarence Osborn did, is simply irrelevant. Even had Kermit Osborn taken the corporation's representatives out on the land and marked the informal line on the ground with a can of spray paint, he could not legally have conveyed exclusive rights to that part of the leasehold. That line had no legal status whatever. All Kermit had in the leased premises was an undivided interest held jointly with Clarence, and the representatives of the corporation had no basis for believing that they could acquire anything more by reason of his conveyance. Thus, although they undoubtedly were under a misapprehension concerning the extent of Kermit's historic use of the premises when they executed the formal division line agreement with Clarence Osborn, Kermit Osborn, and the BLM Area Manager, they knew exactly what they were getting, were willing to accept it, and satisfied with their bargain until they learned how Kermit and Clarence had utilized the property when they leased it jointly. The corporation's representatives, notwithstanding their misapprehension, got exactly what they agreed to take in the division of the leased premises, and the corporation is bound by their contract, which was signed, incidentally, by its vice president, by its secretary-treasurer, and by its attorney.

This case is similar in certain aspects to W. Dalton La Rue, Sr., 9 IBLA 208 (1973), aff'd sub nom La Rue v. United States, Civ. No. 74-2048 (9th Cir. Mar. 2, 1976), cert. denied, 429 U.S. 920 (1976), wherein the Court of Appeals said:

> The location of the fence line is not relevant to the agency's determination of grazing allotments for the appellants or for the Matleys. Any action of the landowners or their predecessors in interest affixing fence lines on federal lands need not be considered by the Bureau in making its independent determination of adequate grazing allotments for each rancher. * * * The Bureau of Land Management has continuing discretion in allocating grazing rights or in changing them from time to time, and there was no abuse of discretion here.

The third point I wish to address is the issue of whether there was undue influence, coercion, discrimination, conflict of interest, or an abuse of discretion on the part of BLM personnel in the establishment of the lease division line between the Wagon Wheel Ranch, Inc., and Clarence Osborn's ranch.

This concern is generated by the fact that Lane Osborn is an employee of the BLM area office which handled this matter and is well known by the BLM employees who were directly involved in the partition of the lease. Lane Osborn is the son of Clarence Osborn, and was born, raised, and presently resides on his father's ranch, and was aware of the application to partition the lease. In one instance Lane himself became directly involved when he was acting as area manager in the manager's temporary absence, and signed a letter, prepared by someone else, providing some procedural information to Wagon Wheel Ranch's attorney.

The testimony of Lane Osborn and other BLM employees was to the effect that he did not otherwise participate in or influence this adjudication. Judge Mesch made no finding concerning Lane Osborn's effect, if any, on the adjudication. Nor did Judge Mesch expressly find that the division line placement was arbitrary, capricious, an abuse of discretion, or discriminatory in those words. However, he did find "the testimony of the Area Manager less reliable, convincing and understandable than the testimony of the other witnesses." Judge Mesch also declared, as one of his five enumerated conclusions, that "the only conceivable reason for changing the division line was to unjustly benefit Clarence Osborn at the expense of appellant, a stranger in the area." This is, in effect, a finding of abuse of discretion and discriminatory conduct on the part of BLM personnel. However, my reading of the record does not disclose any adequate support for such a conclusion. Rather, it seems to flow from the Judge's treatment of the "historical division line" as having a legal dignity of such magnitude as to have invested Kermit with an exclusive right to the property, which he could then convey to the corporation with such binding effect as to foreclose Clarence Osborn from ever acquiring any adjustment of his unofficial, unwritten, informal, private agreement with his own brother. But, as explained above, their agreement had no such legal effect. Insofar as BLM was concerned, and as a matter of law, Kermit and Clarence Osborn were simply joint lessees of equal undivided interests. It seems unlikely that Clarence would have agreed to that sharing arrangement with a stranger or with anyone who was not a member of

his family with whom he was on good terms. When Kermit sold his ranch to such a stranger there was no reason for Clarence to feel any obligation whatever to continue to be constrained by that arrangement, and so he sought to have the partition effected on a more advantageous basis. A line was drawn which all agree comports with the tenets of good range management, all the parties agreed to accept it, and an agreement was formally executed and approved. The contract thus created was not vitiated by the unilateral mistake of fact under which the corporation proceeded, because that mistake was not material to the agreement. See 13 Williston On Contracts (3rd. ed.) § 1573. The mistake was not material because it simply did not matter what private sharing arrangements Kermit had with his brother; such use was not transferable to the corporation and enforceable against Clarence without the joinder and consent of Clarence. All Kermit agreed to sell and Wagon Wheel agreed to buy (with respect to the lease) was Kermit's interest in the lease, which was a joint, undivided interest. Were this the sale of a jointly-owned tract of private land used entirely by one of the owners with the permission of the other, a buyer of the using owner's "interest" in the land certainly could not expect to gain exclusive use and control of the property against the other owner.

In order to insure that they were acquiring the same right of use that Kermit had enjoyed in the joint lease, it was incumbent on the Wagon Wheel representatives to ascertain in advance precisely what land was being used by Kermit and to require that he produce evidence that such use was a transferable right which was legally enforceable against Clarence. Their failure to do so was a failure to exercise ordinary care, and resulted in a mistake of law, as well as a mistake of immaterial fact. Moreover, they knew or should have known, that any division line to partition the lease was subject to BLM approval, regardless of how the private parties might wish to draw it. Therefore, no matter what representations may have been made concerning the area and extent of Kermit's use of the lease, they had no right to expect that they would receive the same when the lease was partitioned. The import of their collective testimony was that they did not know the extent of Kermit's interest when they purchased it, although they knew that he held the lease jointly with Clarence. Caveat emptor.

There is insufficient basis in law or equity to sustain the decision appealed from.

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Edward W. Stuebing
Administrative Judge